

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1210

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA
Respondent

against-

TERRENCE R. IRVING,

Defendant - Appellant

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

BARLOW KATZ & BARLOW
Attorneys for Defendant Appellant
Terrence R. Irving
233 Broadway,
New York, New York 10007
233-0570

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Respondent
One St. Andrews Plaza
New York, New York, 10007

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P/S



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Approved: IRA L. SORKIN
Assistant United States Attorney

Before HONORABLE JOHN B. CARRITY
United States Magistrate,
Southern District of New York.

UNITED STATES OF AMERICA :

-v- :

TERRENCE R. IRVING :

COMPLAINT

Violation of
18 U.S.C. §1708

Defendant . :

SOUTHERN DISTRICT OF NEW YORK, ss.:

Donald P. Howd, being duly sworn,
deposes and says that he is a Postal Inspector of the United
States Postal Service and charges as follows:

On or about the 6th day of February, 1976,
in the Southern District of New York,

Terrence R. Irving

the defendant, unlawfully, wilfully and knowingly did have
in her possession the contents of a certain letter
addressed to:

Charles VanTassell
P.O. Box 664
Poughkeepsie, NY 12602

which had been stolen, taken, embezzled and abstracted from
and out of the mails
knowing the same to have been stolen, taken, embezzled and
abstracted.

The bases for deponent's knowledge and for the
foregoing charge are, in part, as follows:

1. Investigations conducted in the course of his official duties.
2. U.S. Postal Inspection Service Crime Laboratory report dated
October 27, 1976, identifying the defendant as the writer of the
endorsement "T R Irving" on the reverse of the check contained in
the letter.
3. Statement of the addressee that he did not receive the letter
containing the check, or authorize the defendant to receive the
said check.

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WHEREFORE, deponent prays that a warrant may issue for the apprehension of the above-named defendant and that she may be arrested and imprisoned, or bailed, as the case may be.

Donald P. Howd

D. P. Howd
Postal Inspector

Sworn to before me, and subscribed in my presence Nov 3, 1976.

James R. Garity
U.S. Magistrate

11/4- ROR. Prelim. hearing - 11/10 10A.M. - U.S.
Courthouse, Foley Square. No plea entered.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - -X

A3

UNITED STATES OF AMERICA :

-v- :

INDICTMENT
76 Cr.

TERRENCE R. IRVING, :

Defendant. :

- - - - -X

The Grand Jury charges:

On or about the 1st day of February, 1976,
in the Southern District of New York,

TERRENCE R. IRVING,

the defendant , being a Postal Service employee
did unlawfully, wilfully and knowingly embezzle a United States
Treasury Check No. 90,386,496, which had come into her
possession, and was intended to be conveyed by mail,
addressed to: Charles Vantassel, P. O. Box 664,
Poughkeepsie, New York, dated February 1, 1976,
in the amount of \$329.00.

(Title 18, United States Code, Section 1709.)

FOREMAN

ROBERT E. FISKE, Jr.
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A4

UNITED STATES OF AMERICA :

-v- :

INDICTMENT

TERRENCE R. IRVING, :

§ 77 Cr.

Defendant. :

COUNT ONE

The Grand Jury charges:

On or about the 1st day of February, 1976, in the Southern District of New York, TERRENCE R. IRVING, the defendant, being a Postal Service employee did unlawfully, wilfully and knowingly embezzle a United States Treasury Check No. 90,386,496, which had come into her possession, and was intended to be conveyed by mail, addressed to: Charles Vantassel, P. O. Box 664, Poughkeepsie, New York, dated February 1, 1976 in the amount of \$329.00.

(Title 18, United States Code, Section 1709.)

COUNT TWO

The Grand Jury further charges:

On or about the 1st day of February, 1976, in the Southern District of New York, TERRENCE R. IRVING, the defendant, unlawfully, wilfully and knowingly and with intent to defraud the United States, uttered and published as true and caused to be uttered and published as true, a false, forged and counterfeited writing, namely, the endorsement of the payee on a United States Treasury check knowing the same to be false, forged and counterfeited, the check being that described in Count I of this Indictment.

(Title 18, United States Code, Section 495.)

Foreman

ROBERT B. VISKE, JR.,
United States Attorney

United States District Court
SOUTHERN DISTRICT OF NEW YORK

TO *Terrence R. Irving*
267 Mansion Street
Poughkeepsie, N.Y. 12601

GREETING:

WE COMMAND YOU that all and singular business and excuses being laid aside, you and each of you appear and attend before the GRAND INQUEST of the body of the people of the United States of America for the Southern District of New York, at a District Court, to be held at Room *1401* in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, in and for the said Southern District of New York, on the *20th* day of *December* 19 *76*, at *2:00* o'clock in the *after* noon, to testify and give evidence in regard to an alleged violation of Section *8 1708, Title 18, United States Code*

on the part of the United States, and not to depart the Court without leave thereof, or of the United States Attorney.

And for failure to attend you will be deemed guilty of contempt of Court and liable to penalties of the law.

DATED: New York, N. Y. *December 13, 1976*

PAYMOND F. BURCHARDT

Clerk.

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York

Note: Report at Room 450. In order to secure your witness fees and mileage, it is necessary that you retain this Subpoena and present the same at the United States Attorney's Office, Room 450, upon each day on which you attend Court as a witness.

Assistant

Room *746*

HENRY H. KORN
(212) 791-1991

By Direction of the Court
This report furnished pursuant to
Transcript be made available to
CIA not to be for any purpose,
not CIA counsel, and not use,
and not for trial, and not
to be reproduced.

A5

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3

4 - - - - -x
UNITED STATES OF AMERICA, :
5 :
-against- : 76 Cr. 1132
6 :
TERRENCE IRVING, :
7 :
Defendant. :
8 - - - - -x

9
10 BEFORE: HON. ROBERT CARTER,
11 District Judge

12 New York, New York
13 December 20, 1976
14 Room 2903

15 APPEARANCES:

16 ROBERT B. FISKE, JR., ESQ.,
17 United States Attorney for
the Southern District of New York
18 BY: HENRY H. KORN, ESQ.,
Assistant United States Attorney

19 BARLOW, KATZ & BARLOW, ESQS.,
For the Defendant
20 BY: ROBERT KATZ, ESQ.,

1 bjmcg

2

2 MR. KORN: Your Honor, this is a case involving
3 a charge that Miss Irving possessed a check as a postal
4 employee, in fact, embezzled it. We issued a subpoena
5 on the 13th of December, I believe it was, for Miss Irving
6 to appear before the grand jury today at 2 o'clock.
7 At that time I was advised by Mr. Katz that he requested
8 to meet with you sitting as Part I Judge.

9 I believe it is Mr. Katz' application if I am
10 not mistaken.

11 MR. KATZ: Yes.

12 Your Honor, we advised Mr. Korn this morning --
13 as a matter of fact, Mrs. Barlow advised Mr. Korn that we
14 are willing to waive indictment under the 5th Amendment
15 and we are willing to agree to proceed by information.
16 Mr. Korn has, up until the time we came to this ante-
17 room, stated that she was the sole target of the investi-
18 gation. There is a polygraph in existence, your Honor,
19 and Mr. Korn knows about it. It came out positive in her
20 favor. She has the problem not only with respect to this
21 matter here, but there are presently grievance proceedings
22 going on. She has been an employee of the post office for
23 some eight years. We would feel that we would rather pro-
24 ceed by information.

25 Mr. Korn said to me that he would only proceed

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2 on information if she agreed to plead guilty. I don't
3 think those are the rules of this court.

4 THE COURT: In the first place, I can't tell Mr.
5 Korn how he should proceed.

6 MR. KATZ: I think she can come before a judge
7 and ask to be taken by information.

8 MR. KORN: I would state that we are prepared,
9 pursuant to the subpoena, for Miss Irving to appear before
10 the grand jury and at that time raise her 5th Amendment
11 claim after I have appropriately advised her of her rights.
12 At that time she will have had her opportunity to raise her
13 Constitutional rights.

14 MR. KATZ: The only reason Mr. Korn wishes to
15 put her before the grand jury, and it is obvious, is because
16 she is ready to be charged with an information today.
17 That is the only reason Mr. Korn wishes to put her before
18 the grand jury. The sole reason is so that when the time
19 comes for her to take the stand to testify, he will have
20 some ammunition to use, that she took the 5th Amendment.
21 I think it is being done in bad faith. I ask your Honor
22 to consider allowing her the right --

23 THE COURT: I don't think that testimony before
24 the grand jury can be introduced other than just --

25 MR. KATZ: No, your Honor, it could possibly

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2 be introduced for impeachment purposes.

3 THE COURT: If she took the witness stand?

4 MR. KATZ: Right. I am afraid it can be
5 introduced. Otherwise Mr. Korn would not be going through
6 these machinations right now.

7 Your Honor, a lie detector test has come back
8 positive and the lie detector found she did not do the
9 acts she is charged with.

10 THE COURT: I am in no position to evaluate the
11 tactics and procedures of the Assistant U. S. Attorney.
12 That is not my baliwick.

13 You say that you are positive about what he
14 is doing -- I don't know. He could obviously accept the
15 information, in fact, she is ready to proceed on information,
16 and let it go at that.

17 On the other hand, I am in no position to --

18 MR. KATZ: She has no right herself to ask for
19 an information, your Honor.

20 THE COURT: She has a right. The point is that
21 the grand jury is an investigative body and she has been
22 subpoenaed to appear before it. If he calls it off, fine,
23 but otherwise it appears to me that the protection she has
24 in going before the grand jury is asserting her 5th Amend-
25 ment rights.

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2 MR. KATZ: She will sit moot and not agree to
3 be sworn at the time.

4 MR. KORN: Then we would return for the appro-
5 priate application under the contempt proceeding.

6 THE COURT: She will have to be sworn and give
7 her name and to each question she is asked she can assert
8 her right to refuse to answer.

9 MR. KATZ: Then I want a representation from Mr.
10 Korn right now that he is not at this point seeking an
11 indictment, and he is not at this point --

12 THE COURT: What does that have to do with it?
13 She is not going to answer any questions, Mr. Katz.

14 MR. KATZ: I want a representation as to how he
15 is going to use this.

16 THE COURT: You cannot ask him to do that.

17 MR. KATZ: Your Honor, could we adjourn this
18 matter for a week? I would like to have a chance to
19 research this and bring this before the court.

20 THE COURT: No purpose is going to be served
21 by it. The point is that her rights are protected.

22 MR. KATZ: They are thought protected, your
23 Honor. He is actually making evidence if she takes the
24 5th Amendment and he is going to utilize that.

25 THE COURT: She has every right to take the 5th

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2 Amendment. There is nothing in regard to her taking the
3 5th Amendment that can ever get before the jury. That is
4 not even consistent with anything she testifies to at the
5 trial. She testifies at the trial and he may attempt to
6 use it to impeach --

7 MR. KATZ: How would he?

8 THE COURT: Mr. Katz, would you listen. That is
9 one of your problems. You are so involved in your own
10 ideas that you are not listening.

11 The point is, as far as I know and you can
12 research this, that the only basis upon which any prior
13 grand jury testimony can be introduced is to impeach her
14 on the basis of the fact she lied or made inconsistent
15 statements.

16 If she makes no statements, how can he do it?
17 That's as far as I know. Maybe you and Mr. Korn know
18 something else, but I am not going to be trying the case
19 anyway.

20 MR. KATZ: Your Honor, there is another problem
21 here. She will be able to present the case at the grievance
22 board. The United States Government will try to utilize
23 this testimony before the grievance board in an administra-
24 tive proceeding. These are the consequences that I have
25 to examine.

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2 THE COURT: That is something else. She is going
3 to go before the grievance board anyway, isn't she? That
4 has nothing to do with the issue before me.

5 MR. KATZ: He wants to utilize these minutes for
6 some reason otherwise there would be no reason to refuse my
7 offer to allow the information.

8 THE COURT: I am reasonably sure that that is
9 probably true, but he probably does want to do it and is
10 attempting to utilize it to force you and her to make some
11 concessions that you don't want to make.

12 The point is that you have to stand up to them.
13 If you do, the point is to have her go before the grand
14 jury and give her name and refuse to testify.

15 MR. KATZ: I would apply for a week's continuance
16 at this point.

17 THE COURT: There is no basis for that.

18 MR. KATZ: It will take him a week to draw
19 contempt papers anyway.

20 THE COURT: You are foolish to have her in
21 contempt. No, no. I am not giving it to you.

22 MR. KATZ: Would your Honor seal the testimony
23 pending my --

24 THE COURT: I have no basis. You make that
25 application. If she testifies she may make the application

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8

2 then. I doubt that I will, but I have no basis for
3 sealing the testimony as far as I can see. If you have a
4 basis for it, do it then.

5 Thank you, ladies and gentlemen.

6 MR. KORN: Do I understand that to mean that the
7 witness will appear before the grand jury forthwith?

8 THE COURT: The point is that you subpoenaed
9 her. I am in no position to avoid that subpoena.

10 MR. KATZ: Then, your Honor, may I apply for a
11 continuance on the basis that this is the first return date
12 of the subpoena?

13 THE COURT: No, Mr. Katz. You are not making
14 sense. Good afternoon.

15 (Hearing concluded.)

16 ***

HHK:lm

January 20, 1977

Joyce K. Barlow, Esq.
Barlow, Katz & Barlow
233 Broadway
New York, New York

Re: United States v. Irving
S 76 Cr. 1132 (C.E.S.)

Dear Ms. Barlow:

At the pre-trial conference before Judge Stewart on January 10, 1977, you indicated that you would move to dismiss the indictment in this case. You seem to believe that your client's constitutional rights were in some fashion compromised by the Government's (a) subpoenaing Ms. Irving to testify before the December Regular Grand Jury, where she asserted her Fifth Amendment privilege against self-incrimination, and then (b) asking the same Grand Jury to vote an indictment against your client.*

Although the Government believes that there is no legal support for that argument, to avoid a hearing concerning the indictment, the Government resubmitted the case to an entirely different Grand Jury. The evidence before this Grand Jury consisted entirely of the testimony of the postal inspector in charge of the investigation of this case, and this Grand Jury handed up the superseding indictment on the basis of that testimony alone.

I trust that for the foregoing reasons, there will be no necessity for your filing motions attacking the indictment.

* I instructed the Grand Jury that it was to draw no inference in its deliberations from the fact that your client asserted her Fifth Amendment rights.

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HNK:lm

Joyce K. Barlow, Esq.

-2-

January 20, 1977

I enclose herewith a copy of the superseding indictment which was filed on January 20, 1977. Please note that this indictment adds a second count charging that Ms. Irving uttered a forged instrument, namely, the U. S. Treasury check which the Government charges in the first count she embezzled.

Very truly yours,

ROBERT B. FISKE, JR.,
United States Attorney

By:

HENRY H. KORN
Assistant United States Attorney

Enclosure

cc: Honorable Charles E. Stewart
United States District Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA,

Plaintiff,

NOTICE OF MOTION

-against-

TERRENCE R. IRVING,

Defendant.
-----x

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of
JOYCE KRUTICK BARLOW, sworn to on the 7th day of February, 1977,
the indictment and superseding indictment herein and upon all the
proceedings heretofore had herein the undersigned will move this court
before the Honorable Charles E. Stewart, Jr., at a time convenient to
this court for an order:

1. Permitting the court to inspect in camera the Grand Jury
minutes upon which the indictment and the superseding indictment rests;
2. Dismissing the indictment and superseding indictment
herein upon the ground that the defendant's constitutional rights were
violated by the procedures employed by the Office of the United States
Attorney in order to procure said indictment;
3. Dismissing the indictment and superseding indictment
upon the ground that the superseding indictment was not timely filed under

the plan for prompt disposition of criminal cases in this court;

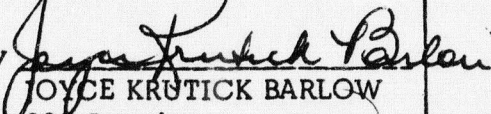
4. For an order permitting the use in evidence of the testimony of a polygraph expert, Victor Kaufman, and permitting into evidence at the trial, the results of the test administered by the said Victor Kaufman.

5. For such other and further relief as this court may deem just and proper under the circumstances.

Dated: New York, N.Y.
February 7, 1977

Yours, etc.

BARLOW, KATZ & BARLOW
Attorneys for Defendant

By 
JOYCE KRUTICK BARLOW
233 Broadway
New York, N.Y. 10007
233-0570

TO:

HENRY KORN, ESQ.
Assistant United States Attorney
Southern District of New York
1 St. Andrews Plaza
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA,,

Plaintiff,

-against-

AFFIDAVIT

TERRENCE R. IRVING,

Defendant.
-----x

STATE OF NEW YORK) ss:
COUNTY OF NEW YORK)

JOYCE KRUTICK BARLOW, being duly sworn, deposes and says:

1. I am a member of the firm of Barlow, Katz & Barlow, attorneys for the defendant Terrence R. Irving and as such am familiar with all the facts and circumstances surrounding the above captioned action.

2. On or about December 10, 1976, I was advised that my client, Terrence Irving, would be subpoenaed to appear before the Grand Jury which was to hear testimony concerning an allegation that she violated Title 18 of the United States Code, Section 1708. I was advised that the subpoena would be returnable on December 20, 1976. In my conversation with Mr. Korn, (the Assistant United States Attorney assigned to the case) I asked him what the purpose of this subpoena was. He advised me that he felt it was his right to have Miss Irving appear before the Grand Jury. It should be noted that Miss Irving had already been arrested on this charge and arraigned before the

Magistrate Garrity on November 3, 1976. At that time, I advised Mr. Korn that I was not sure how I would proceed. However, I would advise him prior to the time required for Miss Irving's appearance.

3. Thereafter, I met with my client and we discussed that entire matter. It was my impression that irrespective of what Miss Irving was to tell the Grand Jury, an indictment would be handed down. Thus, there was no rational by which I could justify having her waive her Fifth Amendment privilege.

4. On the morning of December 20, 1976, I spoke with Mr. Korn and I asked him whether Miss Irving was the target of this Grand Jury. He advised that she was. I then stated that Miss Irving would waive her right to indictment by a Grand Jury and would consent to be prosecuted on the prosecutor's information. Mr. Korn then advised me that this was not acceptable to him. He further advised me that he believed he had an absolute right to bring Miss Irving before the Grand Jury so that she might testify or assert her Fifth Amendment privilege. I told Mr. Korn that we would seek direction of the court and would seek to quash the subpoena, but that if we failed, Miss Irving would in fact invoke the privilege. I further advised that I believed that this procedure to be improper and that he did not have a right, knowing full well that she would invoke the privilege, to force such an invocation when she was obviously the target.

5. Thereafter, on the afternoon of December 20, my partner, Robert A. Katz, appeared with Miss Irving at the Grand Jury and demanded of Mr. Korn that they appear before the Part I judge. Mr. Korn, at that point,

insisted that Miss Irving step into the Grand Jury and declare her Fifth Amendment privilege and that at that point, they could then see the judge. Mr. Katz refused this procedure and finally Mr. Korn agreed that they would go before Judge Carter. Upon appearing before Judge Carter, Mr. Katz recited the facts which I have just recited. Mr. Katz also advised the court that Miss Irving wished to waive her right and to proceed upon an information. He further advised the court that there was some authority that if Miss Irving appeared in the Grand Jury and invoked the Fifth Amendment, that if she later decided to take the witness stand at her trial, this invocation might be used against her upon cross examination. Mr. Korn refused to prosecute upon an information. The court then advised the defendant that if she appeared in the Grand Jury and asserted her privilege, that that could not be used to impeach her upon the trial. The court refused to quash the subpoena, whereupon Miss Irving was called into the Grand Jury, duly sworn, and asserted her Fifth Amendment right.

6. It should be noted that while Mr. Korn and Mr. Katz were walking from the Grand Jury to Judge Carter, Mr. Korn advised Mr. Katz that in fact Miss Irving was not the sole target but that the Grand Jury would be investigating the participation of other individuals as well. This, of course, was a new stance which the defense had not heard of previously. However, upon appearing before Judge Carter, Mr. Korn reverted to his original sole target theory.

7. Thereafter, I had a discussion with the United States Attorney in which I stated that it was my belief that a defendant had an

absolute right to waive any federally protected right. Therefore, his refusal to accept the waiver constituted a violation of a constitutionally protected privilege. The indictment was thus tainted and would have to fail. This belief is based upon the United States Supreme Court's recent decision in the case of Gary Mark Gilmore.

8. Upon being advised of this defense theory, Mr. Korn sought to cure this defect. He attempted to do so by securing a superseding indictment which contained an additional count; that of a violation of Title 18, United States Code, Section 495. Mr. Korn advised this office that this new indictment was intended to cure the defect and that it had been procured upon wholly new evidence which had not previously been presented to the prior Grand Jury.

9. On January 31, I met with Mr. Korn at his office at which time he advised me that the new indictment was not based on wholly new material. Rather he had proceeded upon the minutes of the postal agent's testimony before the prior Grand Jury, merely eliminating the defendant's invocation of the Fifth Amendment privilege.

10. It is respectfully submitted to this court that if the proceedings before the second Grand Jury resulting in an indictment, were predicated upon the same testimony heard by the first Grand Jury, then the new indictment is just as tainted by the improper proceedings as was the first. It is in effect the fruit of a poisonous tree. It is, therefore, the defendant's position that this court should examine in camera the minutes of the proceedings had before each Grand Jury. If the court should then determine that the second

indictment was predicated upon the same testimony as that of the first, then it is the defendant's contention that the indictments must be dismissed upon the ground that they were procured in violation of the defendant's constitutional rights, to wit the right to waive indictment.

11. Although I am not in possession of the date upon which the superseding indictment was handed down, I have been advised that it was handed down sometime after January 3, 1976. Pursuant to Rule 3 of the Plan for Prompt Disposition of Criminal Cases, promulgated by this court pursuant to the requirements of Rule 50b of the Federal Rules of Criminal Procedure, the defendant had to be indicted no later than January 3. The defendant does not contend that the first indictment was not timely. The defendant concedes the fact that the first indictment, which was apparently voted on December 20, 1976, was certainly timely. The rules promulgated under the plan which permits the filing of a superseding indictment and sets forth time limits where the indictment charges the same offense or with an additional offense required to be joined with the original offense appear in Rule 5D. In the case at bar, the defendant was charged with an additional offense which was not required to be joined. It is, in fact, a separate and distinct offense which could stand on its own. The defendant contends that in light of this, the superseding indictment containing such a charge would have had to be filed no later than January 3, 1977 pursuant to Rule 3. Since this was not the case and since the indictment was not voted until sometime late in January, it is the defendant's contention that this indictment must be dismissed upon the ground that

the government has failed to comply with the rules for the prompt disposition of criminal cases.

12. An investigation on this matter was begun by the postal authorities some time in June of 1976. At that time, the defendant, who was employed by the United States Postal Service, was represented by Lynn Hanig, Esq. of Poughkeepsie, New York. At that time, Mrs. Hanig contacted me and related the facts of the case to me. She requested my advice on how to proceed. She advised me that the client insisted that she was innocent and that she had not endorsed nor did she cash the subject check. I suggested at that time that she arrange for a polygraph examination to be performed by Victor C. Kaufman who is associated with the New York Lie Detection Laboratories, 17 Battery Place, New York, N. Y. My suggestion was followed and on July 17, 1976, Miss Irving submitted to the examination. The report submitted by Mr. Kaufman is annexed hereto as Exhibit A. It was the opinion of Mr. Kaufman that Miss Irving had answered all of the questions truthfully and that no deception was indicated in her recorded responses.

12. The defendant urges this court to permit the use in evidence of Mr. Kaufman's testimony regarding the administration of this examination as well as his expert opinion as to its results. The defendant will submit a brief memorandum of law supporting this position and dealing with the other issues involved in this motion as well. In this affidavit, however, defendant will merely state the factual basis for requesting such a ruling.

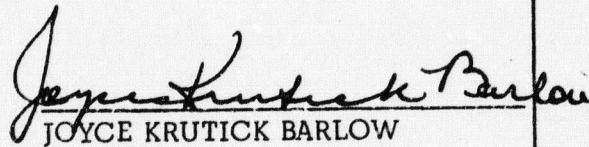
13. The examination conducted by the Government Crime Lab indicated that Miss Irving signed the endorsement T.R. Irving on the subject check, but that she did not sign the endorsement Charles Vantassell. This is a case in which serious questions arise as to whether Miss Irving is in fact telling the truth when she states, as she will at the trial of this matter, that she did not in fact endorse or cash the subject check. Miss Irving has offered herself to the United States Attorney for such testing by an expert of his choice. To this date, however, the United States Attorney has taken no action upon this offer.

14. Mr. Kaufman's qualifications as a polygraph expert are unquestionable. Until 1964 he was a member of the New York City Police Department. At the time of his retirement he was the Commanding Officer (rank of lieutenant) of the Brooklyn South Homicide Squad. He has been an instructor in police science at Brooklyn College and has lectured on many occasions at other colleges and universities. Mr. Kaufman is a licensed polygraph examiner and a charter member of the American Polygraph Association. He has been active in the field of polygraph analysis for over fifteen years and is the author of many articles appearing in professional and security journals upon this subject. Mr. Kaufman has been qualified as an expert for testimony on many occasions in the federal courts, the New York state courts, and in arbitration proceedings. In 1972, Mr. Kaufman was qualified as an expert on polygraph examination before the Hon. Jack Weinstein in the United States District Court for the Eastern District of New York, and rendered

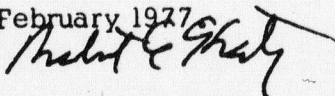
testimony as to testing procedures which he had administered. He is recognized in the field of criminology as one of the leading polygraph analysts. For the court's use, I am annexing as Exhibit B a copy of his biographical sketch. There can be no doubt that his credentials are excellent and that he is eminently qualified to render an opinion predicated upon tests which he administered in this case. It is most respectfully submitted that were the jury in this case not to hear this evidence, they could not render a verdict which is based upon all the credible evidence. It is essential to a proper determination of this case that this evidence be placed before the jury.

14. Counsel has chosen to make this application by way of a pretrial motion rather than by merely calling Mr. Kaufman to the stand and then having the government object, so that the trial may proceed in an orderly fashion; and so that the jury may not be prejudiced further for or against the defendant by the exclusion of Mr. Kaufman's testimony if that be the court's decision.

WHEREFORE, your deponent respectfully requests that this motion be in all respects granted.


JOYCE KRUTICK BARLOW

Sworn to before me this
7th day of February 1977



Notary Public
New York
1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

:

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-v-

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AFFIDAVIT

S 76 Cr. 1132 (CES)

TERRENCE R. IRVING, :

:

Defendant. :

:

- - - - - X

STATE OF NEW YORK)

COUNTY OF NEW YORK : ss.:

SOUTHERN DISTRICT OF NEW YORK)

HENRY H. KORN, being duly sworn, deposes and

says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr. and have charge of the prosecution of this case. I make this affidavit in opposition to defendant's motion attacking the indictment and superseding indictment in this case.

The Indictment

2. On December 13, 1976, the defendant was subpoenaed to testify before the December Regular Grand Jury to hear testimony concerning an allegation that she violated Title 18, United States Code, Section 1709.

3. The defendant appeared before the grand jury on December 20, 1976, after her attorney unsuccessfully sought to quash or adjourn the return date of the subpoena. The defendant was given Miranda warnings and was advised she was a target of the grand jury investigation. After each question put to her by the Government, she requested

to consult with her attorney, which was done. And each time after returning the defendant asserted her Fifth Amendment privilege against self-incrimination.

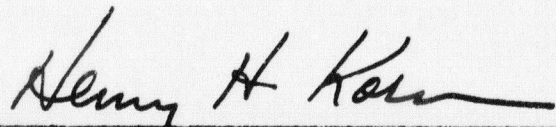
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4. The Government also called the postal agent in charge of the case and he related to the grand jury the material facts of the case. After being advised by the Government that it was to draw no adverse inference from the defendant's assertion of her Fifth Amendment rights, the grand jury handed up the Indictment.

The Superseding Indictment

5. On January 14, 1977, the Government resubmitted the case to the January Regular Grand Jury. The evidence before the grand jury consisted entirely of the testimony of the postal agent in charge of the investigation of this case. The grand jury handed up the Superseding Indictment which adds to the original Indictment a forgery count under 18 U.S.C. §495.

6. The Government resubmitted the case to the January Regular Grand Jury to avoid the instant motions in this case. The Government never conceded that the Indictment was defective. See my letter dated January 20, 1977 to Joyce K. Barlow, Esq. At all times the defendant's constitutional rights have been scrupulously respected.



HENRY H. KORN
Assistant United States Attorney

Sworn to before me this
16th day of February, 1977

LAWRENCE FARKASH
Notary Public, New York State
No. 24-480680
Qualified in Kings County
Comm. Expires March 30, 1979

UNITED STATES OF AMERICA,

-against-

TERRENCE R. IRVING,

Defendant.

S 76 Cr. 1132

STEWART, DISTRICT JUDGE:

Defendant Irving was arraigned before Magistrate Garrity in Poughkeepsie, New York, on November 3, 1976. An indictment was filed on December 21, 1976, containing one count of embezzlement of a Treasury check, under 18 U.S.C. §1709. A Superseding Indictment was filed on January 14, 1977, which consisted of the single count in the original indictment, plus an additional count of forgery under 18 U.S.C. §495. The forgery count alleges a forgery of the same Treasury check which is the subject of the embezzlement count of the indictment.

The defendant asks the Court to dismiss the indictment on several grounds. First the defendant claims that the original indictment should be dismissed due to taint, since the U.S. Attorney insisted upon calling the defendant before the Grand Jury, where she took the Fifth Amendment, after the defendant's attorney had stated the defendant wanted to waive her right to be prosecuted by an indictment. We assume the defendant is claiming that the

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Grand Jury was tainted by its hearing her assert her Fifth Amendment privilege, even though the U.S. Attorney instructed the Grand Jury that it was to draw no inference in its deliberations from the fact that the defendant had asserted her Fifth Amendment rights. An attempt by the defendant to quash the subpoena, on the day of the testimony, was denied by Judge Robert Carter.

We find that defendant's claim that the indictment should be dismissed due to this "taint" is without merit on two grounds. First, while it is true that in certain circumstances a defendant may waive his right to be prosecuted by an indictment, there is nothing which requires the Government to accept this waiver and proceed by information. The Grand Jury has a right to subpoena any witness, just as any witness has a right to assert his Fifth Amendment right.^{1/} No question has been raised in this case concerning the warnings given to the defendant; she was apparently properly advised of her constitutional rights, and in fact consulted her attorney after each question.

Secondly, even if the original indictment was tainted by this act, the superseding indictment was presented to a different Grand Jury, without the testimony of the defendant.^{2/} The evidence

^{1/} Unless, of course, the witness is "granted immunity co-extensive with the privilege against self-incrimination." U.S. v. Calandra, 414 U.S. 338, 346 (1974).

^{2/} The U.S. Attorney choose to bring a superseding indictment before a new Grand Jury, after learning at a pre-trial conference that the defendant felt the first indictment was tainted by the fact that the original Grand Jury heard her assert her Fifth Amendment rights. The Government does not concede the taint, but choose to avoid the issue by the resubmission of the case, without her testimony to a new Grand Jury.

before the Grand Jury voted the superseding indictment, consisted entirely of the testimony of the postal agent in charge of the investigation (Korn Affidavit, ¶5). Thus the indictment could in no way be tainted by the defendant's earlier assertion of her privilege.^{3/}

The defendant also argues that the superseding indictment was not timely filed, and therefore must be dismissed. Rule 3 of Southern District Plan for the Prompt Disposition of Criminal Cases (the Plan) provides that if the arrest occurs at the time of the arrest in the instant case, the Government must file an indictment or information within 60 days of the arrest. The original indictment, filed December 21, 1976, was brought well within the 60-day time period, as the defendant was first arraigned before Magistrate Garrity on November 3, 1976. The defendant argues that the superseding indictment should have been brought within this same 60-day period. However, a reading of the Plan shows that such an interpretation is not warranted. Rule 5(d)(5) states,

The time within which an indictment or information must be obtained on the subsequent charge, or within which an arraignment must be held on such charge, shall be determined without regard to the existence of the original indictment or information.

We agree with the decision of Judge Palmieri in United States v. Cumberbatch, 76 Cr. 1076 (December 16, 1976), that, "[i]t is highly unlikely that the Plan envisioned a requirement that all subsequent

^{3/} The defendant also requests the Court to inspect the minutes of the Grand Juries to see if tainted. However, since the Assistant U.S. Attorney has sworn that the defendant's testimony was not read to the second Grand Jury, the Court sees no reason to examine the minutes, since there can be no taint.

indictments be filed within 60 days of a defendant's arraignment on the original indictment." This interpretation is particularly warranted in light of Rule 5(d)(2) which states that if the original indictment is pending at the time the superseding indictment is filed, the trial must commence within the time limit for commencement of the trial on the original indictment. Reading the provision of Rule 5(d)(2) with Rule 5(d)(5), leads the Court to conclude that the only requirement is that the superseding indictment be filed within the time period in which the defendant must be tried on the original indictment, in this case, six months from the date of arraignment.

Accordingly, defendant's motion to dismiss the indictment is denied.

Defendant also moves to have the results of a polygraph test admitted into evidence. The Government opposes this motion.

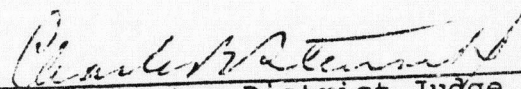
The leading case on this point is Frye v. United States, 292 F. 1013 (D.C. Cir. 1923). Its holding that unstipulated polygraph tests are inadmissible has been consistently followed by the Federal Courts. United States v. Bando, 244 F.2d 833, 841 (2d Cir.), cert. denied 355 U.S. 844 (1957); United States v. Cochran, 499 F.2d 380, 393 (5th Cir. 1974), cert. denied 419 U.S. 1124 (1975); United States v. Skeens, 494 F.2d 1050, 1053 (D.C. Cir. 1974); United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975); United States v. Hart, 344 F.Supp. 522, 524 (E.D.N.Y. 1971).

The defendant cites the court to two District Court cases which support the admissibility of polygraph evidence, United States v. Ridling, 350 F.Supp. 90 (E.D. Mich. 1972) and United States

v. De Betham, 348 F. Supp. 1377 (S.D. Cal. 1972). In the later case the Court articulated reasons to support the admissibility of the polygraph evidence but excluded the evidence due to precedent. The Court finds these cases to be contrary to the weight of authority.

Accordingly, the Court denies defendant's motion to permit the testimony of a polygraph expert.

SO ORDERED.


United States District Judge

DATED: New York, N.Y.

February 18, 1977.

LB/je

UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-v- :

TERRENCE R. IRVING :

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United States Courthouse
Foley Square
New York, New York

December 20, 1976
2:40 o'clock p.m.

APPEARANCES:

HENRY KORN, Esq.,

Assistant United States Attorney

Linda Bederman
Acting Grand Jury Reporter

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2 THE FORELADY: Do you swear that the testimony
3 you are about to give before this Grand Jury in
4 the matter pending before it will be the truth,
5 the whole truth and nothing but the truth, so help
6 you God?

7 MS. IRVING: May I please see my attorney?

8 MR. KORN: Yes, you may.

9 (Ms. Irving leaves room, then returns.)

10 MR. KORN: May the record reflect that Miss
11 Irving has returned after leaving the Grand Jury
12 room.

13 You may continue, please, Madam Forelady.

14 THE FORELADY: You didn't answer to the swear-
15 ing in. Would you please stand and raise your
16 right hand, please?

17 You do solemnly swear that the testimony you
18 are about to give to this Grand Jury in the matter
19 now pending before it shall be the truth, the
20 whole truth and nothing but the truth, so help you
21 God?

22 MS. IRVING: I invoke the Fifth Amendment of
23 the United States Constitution.
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BY MR. KORN:

Q Miss Irving, this Grand Jury is investigating the charge of the theft of check from the mail from the Post Office in Poughkeepsie, New York.

You are a target of this investigation, which means it may result in your being charged with a criminal offense. In this respect, I want to inform you of your Constitutional rights.

You have a right to refuse to answer any question that you believe would tend to incriminate you personally. Any statement you do give in response to a question could be used against you in a court of law.

You have the right to consult with and have an attorney present outside the Grand Jury room, and if you do not have funds to retain an attorney, the Court will appoint one for you and you have the same right to consult with that attorney outside the Grand Jury room.

Do you understand those rights?

A May I please see my attorney?

MR. KORN: Yes, you may.

Excuse me, would you please excuse the witness temporarily?

THE FORELADY: You are excused temporarily, please.

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1
2 MR. KORN: May the record reflect that Miss
3 Irving has left the Grand Jury room to consult with
4 her attorney as she requested to do so.

5 (Miss Irving leaves room, then returns.)

6 BY MR. KORN:

7 Q Miss Irving, I have read to you certain rights
8 that you have in addition to the fact that I advised you that
9 this Grand Jury is investigating the theft of a check from
10 the mail and that you were a target of that investigation.

11 Now, do you understand those rights?

12 A (No response.)

13 Q I merely asked if you understood what those rights
14 are.

15 A (No response.)

16 Q By your silence, I take it you refuse to answer; is
17 that right?

18 A (No response.)

19 Q By your silence, I take it it means you do not
20 understand the rights?

21 A (No response.)

22 Q I take it your attorney, Mr. Katz, is outside the
23 Grand Jury room today; is that right?

24 A (No response.)

25 MR. KORN: May the record reflect that the

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1 witness is silent at each time.

2
3 May the record reflect that each time I ask
4 a question.

5 May the record reflect that at this point the
6 witness has not been sworn in, she refused to be
7 sworn in, resting on the Fifth Amendment claim,
8 the Fifth Amendment right, excuse me, under the
9 Constitution.

10 Q Miss Irving, how are you employed?

11 A (No response.)

12 MR. KORN: May the record reflect that the
13 witness has refused to answer.

14 MS. IRVING: May I speak with my attorney,
15 please?

16 MR. KORN: Yes, you may.

17 May you temporarily excuse the witness,
18 please?

19 THE FORELADY: You are so ordered to be
20 excused temporarily.

21 MR. KORN: May the record reflect that the
22 witness has left the room to consult with her
23 counsel after requesting to do so.

24 (Miss Irving leaves room, then returns.)

25 MR. KORN: Could you repeat the last question

Irving 12-20-76

1
2 to the witness, please?

3 First of all, may the record reflect that the
4 witness has returned to the Grand Jury room.

5 (The record was read.)

6 MS. IRVING: I invoked the Fifth Amendment of
7 the United States Constitution.

8 BY MR. KORN:

9 Q Are you employed in the Post Office in Poughkeepsie
10 New York?

11 A May I see my attorney?

12 Q Yes, you may.

13 A Thank you.

14 MR. KORN: Excuse me, could you temporarily
15 excuse the witness?

16 THE FORELADY: You may be excused temporarily,
17 please.

18 MR. KORN: May the record reflect that the
19 witness has left the Grand Jury room to consult
20 with her counsel after requesting to do so.

21 (Miss Irving leaves room, then returns.)

22 BY MR. KORN:

23 Q In your capacity as a postal employee in February of
24 1976, did you have charge of placing mail in the Post Office
25 boxes for customers?

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A May I see my attorney?

MR. KORN: You may temporarily excuse the witness, please.

THE FORELADY: You may temporarily be excused.

MR. KORN: May the record reflect that the witness is leaving the Grand Jury room to consult with counsel after requesting to do so.

(Miss Irving leaves room, then returns.)

A I invoke the Fifth Amendment of the United States Constitution.

BY MR. KORN:

Q And in your capacity as a postal employee who places mail into Post Office boxes, this would include placing United States Treasury checks or other State or Local government checks; is that right?

A May I see my attorney?

MR. KORN: You may temporarily excuse the witness.

THE FORELADY: You may be excused temporarily.

MS. IRVING: Thank you.

MR. KORN: May the record reflect that the witness has left the Grand Jury room to consult with her counsel after requesting to do so.

(Miss Irving leaves room, then returns.)

1
2 A I invoke the Fifth Amendment of the United States
3 Constitution.

4 Q Now, Miss Irving, when you were hired as a postal
5 employee, you went through a training program; isn't that
6 right?

7 A May I see my attorney?

8 MR. KORN: Could you please temporarily excuse
9 the witness?

10 THE FORELADY: You are temporarily excused.

11 THE WITNESS: Thank you.

12 MR. KORN: May the record reflect that the
13 witness has left the Grand Jury room to consult with
14 her counsel after requesting to do so.

15 (Miss Irving leaves room, then returns.)

16 A I invoke the Fifth Amendment of the United States
17 Constitution.

18 Q And this training program which you took when you
19 were hired included advising you that tampering with the
20 mail is a violation of law and would result in an employee's
21 being fired; isn't that right?

22 A May I see my attorney?

23 MR. KORN: Could you please temporarily excuse
24 the witness?

25 THE FORELADY: You are temporarily excused,

Irving 12-20-76

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1
2 please.

3 MR. KORN: May the record reflect that the
4 witness has left the Grand Jury room to consult
5 with counsel after requesting to do so.

6 (Miss Irving leaves room, then returns.)

7 A I invoke the Fifth Amendment of the United States
8 Constitution.

9 Q As a postal employee, you realize that if an
10 employee were to take a check belonging to another person
11 and cash it, that employee would have committed a crime and
12 could be fired; isn't that right?

13 A May I see my attorney?

14 MR. KORN: Could you please temporarily excuse
15 the witness?

16 THE FORELADY: You are temporarily excused.

17 MR. KORN: May the record reflect that the
18 witness has left the Grand Jury room to consult
19 with counsel after requesting to do so.

20 (Miss Irving leaves room, then returns.)

21 A I invoke the Fifth Amendment of the United States
22 Constitution.

23 Q As an employee of the postal services, you realize
24 that to open mail which you handle is itself a crime?

25 A May I see my attorney?

Irving 12-20-76

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1
2 MR. KORN: Could you temporarily excuse the
3 witness?

4 THE FORELADY: You may be temporarily excused.

5 MS. IRVING: Thank you.

6 (Miss Irving leaves room, then returns.)

7 A I invoke the Fifth Amendment of the United States
8 Constitution.

9 Q As a postal employee, you have never opened a
10 letter which you have handled; is that right?

11 A May I see my attorney?

12 MR. KORN: Could you temporarily excuse the
13 witness, please?

14 THE FORELADY: You may be temporarily excused
15 to consult with your attorney.

16 (Miss Irving leaves room then returns.)

17 A I invoke the Fifth Amendment of the United States
18 Constitution.

19 Mr. Korn, Mr. Katz would like to see you.

20 MR. KORN: I will continue with my inquiries,
21 please, until all the questions are before this
22 Grand Jury, at which time I intend on making an
23 application before the Part I Judge for appropriate
24 relief.

25 Excuse me one minute, please.

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Irving 12-20-76

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(Mr. Korn leaves room, then returns.)

MR. KORN: May the record reflect that I have returned.

Could you mark this as Grand Jury Exhibit 1?
(So marked.)

BY MR. KORN:

Q Miss Irving, I show you Grand Jury Exhibit 1 and specifically the reverse side of the check or the copy of the check marked as Grand Jury Exhibit 1 is the second page of the Xeroxed pages.

Did you sign the name of Charles Vantassell, the payee or the name T.R. Irving on the back?

A May I see my attorney?

MR. KORN: Could you please temporarily excuse the witness?

THE FORELADY: You may be temporarily excused.

MR. KORN: May the record reflect that the witness has left the Grand Jury room to consult with counsel after requesting to do so.

(Miss Irving leaves room, then returns.)

A I invoke the Fifth Amendment of the United States Constitution.

MR. KORN: You may temporarily excuse the witness.

Irving 12-20-76

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1
2 THE FORELADY: It is so ordered that you may
3 be temporarily excused.

4 MR. KORN: You may advise your attorney.
5 Mr. Katz, that your appearance before the Grand
6 Jury is temporarily postponed pending application
7 by the Government before Judge Carter and that this
8 does not mean that you are excused for the day.
9 You are still a witness before this Grand Jury.

10 (Time noted - 3:00 o'clock p.m.)
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1
2 D O N A L D B. H O W D, called as a witness, having
3 been first duly sworn by the Forelady of the Grand Jury,
4 testified as follows:

5 BY MR. KORN:

6 Q Could you please state and spell your name for the
7 record?

8 A Donald B. Howd, H-o-w-d.

9 Q Mr. Howd, how are you employed?

10 A As a postal inspector for the U.S. Postal Service.

11 Q How long have you been so employed?

12 A Eleven years.

13 Q Out of what branch or what office are you a postal
14 inspector?

15 A My office is in Mount Vernon, New York.

16 Q Does the Mount Vernon office cover the Poughkeepsie,
17 New York region?

18 A Yes.

19 Q As a postal inspector, Mr. Howd, have you come to
20 know the training procedure for postal employees of the
21 postal service?

22 A Yes.

23 Q Does that include giving postal employees or new
24 potential postal employees information about certain criminal
25 activity?

Howd 12-20-76

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2 A Yes.

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4 Q And in particular; do you advise them about the
5 consequences of opening mail or touching mail that's addressed
6 to other people than themselves?

7 A Yes.

8 Q What do you tell them?

9 A New postal employees are told that to tamper with
10 mail in any way, whether to mishandle it by throwing it away
11 or by actually stealing it or embezzling it is a crime for
12 which they may be prosecuted, and it also may result and
13 probably will result in a dismissal from their jobs.14 Q Now, in May of 1976 did you receive a complaint
15 from a Mr. Charles Vantassell?

16 A Yes.

17 Q Do you know what Mr. Vantassell was complaining
18 about?19 A The complaint was in the form of a claim that he
20 did not receive his Veterans' check for February of 1976.21 Q Was that check in the approximate amount of
22 \$329?

23 A Yes.

24 Q Do you know how mail is delivered to Mr. Vantassell?

25 A Yes, Mr. Vantassell receives his mail through
Post Office Box 64 in the main office, Poughkeepsie, New York.

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2 Q When you say receives it, his mail is put in a little
3 box?

4 A Yes, in the Post Office building itself. He does
5 not receive delivery in his house.

6 Q Now, in the course of your official duties, have
7 you come to know the type of work that an employee by the
8 name of Terrence R. Irving performs?

9 A Yes.

10 Q What kind of work does she do?

11 A Her work on the Poughkeepsie Post Office is varied.
12 She performs distribution of mail which would include work
13 in and around the box section and window service, selling
14 stamps and other services to the customers.

15 Q So her work would include placing letters in these
16 little mail boxes on occasion; is that right?

17 A From time to time it could, yes.

18 Q Now, I will show you Grand Jury Exhibit 1 marked
19 for identification. Do you know what that is, Sir?

20 A Yes.

21 Q Could you tell the Grand Jury what it is?

22 A It's a photocopy of a Treasury check addressed to
23 Mr. Vantassell.

24 Q Could you state to the Grand Jury what names appear
25 on the second page of that exhibit?

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A The second page which represents the reverse side of the check shows two endorsements; Charles Vantassell and T.R. Irving.

5

6

Q Now, were you informed by Mr. Vantassell that he did not receive this check?

7

A Yes.

8

9

Q And did he also tell you that he neither endorsed the check, nor authorized anyone to endorse his name on it?

10

A Yes, that's correct.

11

12

Q Now, in August of 1976, Mr. Howd, were samples of Terrence R. Irving's handwriting taken?

13

A Yes.

14

15

Q Were the samples and this check sent down to the Crime Lab in Washington for analysis?

16

17

18

A Yes, handwriting that was on file at the Post Office and the original check were sent to our laboratory in Washington.

19

20

Q And did the Crime Laboratory submit a report concerning the results of this analysis?

21

A Yes.

22

23

Q And what did the handwriting analysis show?

24

25

A The report from our laboratory in Washington stated that Miss Irving was the author of the signature "T.R. Irving" on the reverse of the check, and that she possibly was the

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1 author of the endorsement "Charles Vantassell."

2 Q Now, also in the course of your investigation, was
3 a fingerprint analysis made of this particular check?
4

5 A Yes.

6 Q And where was that fingerprint analysis made?

7 A At the same laboratory in Washington.

8 Q And what were the results of that fingerprint
9 analysis?

10 A The laboratory informed me that six of Miss
11 Irving's fingerprints were found on the check.

12 Q Now, did Miss Irving at any time ever see the
13 original check which you have just testified about?

14 A Yes.

15 Q In what form did she see it?

16 A When she was interviewed on November 3, she was
17 shown the check in a plastic envelope.

18 Q Now, you say "interviewed on November 3." Was this
19 after her arrest?

20 A At the time of her arrest, yes.

21 Q And isn't it a fact, or is it true, Mr. Howd, that
22 she was interviewed back in June of 1976?

23 A Yes, by Inspector Kennerson.

24 Q Do you know, if you can recall, whether Inspector
25 Kennerson also showed her a copy of a check?

1 A He showed her only a photocopy. That's all that
2 he had in his possession at the time.
3

4 Q So he never showed her the original?

5 A No.

6 MR. KORN: Now, Ladies and Gentlemen of the
7 Grand Jury, I'd like you to temporarily excuse the
8 witness, if you might.

9 THE FORELADY: You may be temporarily excused
10 please, thank you.

11 (Witness temporarily excused.)

12 MR. KORN: Now, Ladies and Gentlemen, I am
13 going to first instruct you about the hearsay
14 warnings that you hear so often, that is, that
15 Inspector Howd is not testifying altogether from
16 firsthand knowledge.

17 You are always entitled to hear firsthand
18 testimony in this case, which obviously would
19 include, if necessary, the fingerprint analyst or
20 the handwriting expert, among others.

21 I am not asking at this time for you to
22 consider this indictment, because I do want to
23 before Judge Carter and before you do make a
24 decision on the indictment I want to be able to
25 bring Mrs. Irving back here into the Grand Jury

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12-20-76

1 room, and so I merely wanted to get the testimony
2 of Inspector Howd before you to maximize as much
3 as possible the time that we ask you to serve as
4 a Grand Jury.
5

6 A JUROR: He said it's possible that it's
7 her signature on it. He didn't say that it's her
8 handwriting.

9 MR. KORN: Off the record.

10 (Discussion off the record.)

11 (Time noted - 3:10 o'clock p.m.)

12 - - -

Irving 12-20-76

20

1 T E R R E N C E R. I R V I N G, called as a witness,
2
3 having been first duly sworn by the Forelady of the
4 Grand Jury, testified as follows:

5 BY MR. KORN:

6 Q Could you please state your name and spell your
7 name for the record?

8 A May I see my attorney?

9 MR. KORN: Could you please temporarily
10 excuse the witness?

11 THE FORELADY: You are temporarily excused.

12 MR. KORN: May the record reflect that the
13 witness has left the Grand Jury room to consult
14 with her counsel after requesting to do so.

15 (Witness leaves room, then returns.)

16 THE WITNESS: Mr. Korn, Mr. Katz would like
17 to speak with you.

18 (Mr. Korn leaves room, then returns.)

19 MR. KORN: Could you repeat the last question
20 that I asked?

21 (The record was read.)

22 A I invoke the Fifth Amendment of the United States
23 Constitution.

24 Q Now, Miss Irving, I first advised you after this
25 recess, I advised you of your rights and I asked several

Irving 12-20-76

21

1
2 questions in connection with this investigation.

3 I think what I will do is have the Court Reporter
4 reread those questions to you, and your answers, which in
5 each case, as I recall, was an invocation of your Fifth
6 Amendment right.

7 MR. KORN: Madam Reporter, would you please
8 just for the record and for the sake of continuity
9 reread those questions?

10 (The record was read.)

11 BY MR. KORN:

12 Q After reading those rights to you, Miss Irving,
13 do you understand those rights? Are you resting on a Fifth
14 Amendment privilege against self-incrimination?

15 A May I speak with my attorney?

16 MR. KORN: Could you temporarily excuse the
17 witness?

18 THE FORELADY: You are temporarily excused.

19 MR. KORN: May the record reflect that the
20 witness has left the Grand Jury to consult with
21 counsel after requesting to do so.

22 (Witness leaves room, then returns.)

23 THE WITNESS: What was your question?

24 MR. KORN: Could you read the question,
25 please?

Irving 12-20-76

22

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(The record was read.)

3

A I invoke the Fifth Amendment of the United States
4 Constitution.

5

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7

MR. KORN: Now, going back, Madam Reporter,
to the question I believe was Miss Irving, how are
you employed, could you just please read from there?

8

(The record was read.)

9

Q Miss Irving, I show you Grand Jury Exhibit 1. Miss
10 Irving, did you ever physically touch the original check?

11

A May I see my attorney?

12

MR. KORN: Sure.

13

THE FORELADY: You may be excused.

14

(Witness leaves room, then returns.)

15

A I invoke the Fifth Amendment of the United States
16 Constitution.

17

Q You never cashed this check?

18

A May I see my attorney?

19

MR. KORN: Yes. Temporarily excused.

20

THE FORELADY: You may be excused temporarily.

21

MR. KORN: May the record reflect the witness
22 has left the Grand Jury room to consult with
23 counsel after requesting to do so.

24

(Witness leaves room, then returns.)

25

A I invoke the Fifth Amendment of the United States

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1
2 Constitution.

3 MR. KORN: Could you excuse the witness,
4 please?

5 THE FORELADY: You may be temporarily excused.

6 THE WITNESS: Am I to come back, or what, or
7 can I leave to go home?

8 MR. KORN: You may leave and I will advise
9 your counsel, but please stay around for a short
10 period.

11 THE WITNESS: Thank you.

12 (Witness temporarily excused at 3:28 P.M.)
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1
2 DONALD B. HOWD, recalled as a witness, having
3 been previously duly sworn, resumed and testified
4 further as follows:

5 THE FORELADY: May I advise you that you
6 are still under oath?

7 THE WITNESS: Yes.

8 BY MR. KORN:

9 Q Mr. Howd, a question was raised by the Grand Jury,
10 and I think it would be helpful if you could answer, and
11 the question was to the best of your knowledge did Miss
12 Irving know Mr. Vantassell, the payee of the check, or did
13 ~~Mr. Vantassell~~ know Miss Irving?

14 A As far as we were able to determine from Mr.
15 ~~Vantassell~~, he does not know Miss Irving.

16 Q And that is not Mr. Vantassell's signature on the
17 reverse side; is that right?

18 A That's correct. Our laboratory also indicated to
19 us that Mr. Vantassell did not sign the name "Charles
20 ~~Vantassell~~" on the reverse of the check.

21 MR. KORN: Thank you.

22 Would you temporarily excuse the witness?

23 THE FORELADY: You may be excused.

24 (Witness excused.)

25 MR. KORN: I have already prepared the papers

12-20-76

1
2 in connection with an indictment, and you may vote
3 on it.

4 I must instruct you that you are to draw no
5 inference whatsoever from the fact that this witness
6 invoked the Fifth Amendment. It should not be in
7 any way a factor in your consideration of this
8 indictment which way you want to vote the indictment.

9 Thank you very much.

10 (Whereupon, Mr. Korn and the Reporter left the
11 Grand Jury room.)

12 (Whereupon, at 3:36 p.m., the Grand Jury voted.)
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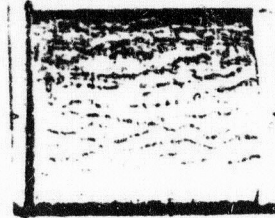
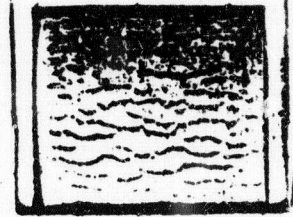


EXHIBIT No. 1

11676

U. S. GRAND JURY
S. D. N. Y.

TREASURY
FISCAL SERVICE
DIVISION OF DISBURSEMENT

AUSTIN, TEXAS

Check No. 90,386,496

SYMBOL 2205

United States Treasury

PAY TO THE
ORDER OF CHARLES VANTASSELL
P O BOX 664
POUGHKEEPSIE NY 12602

12-190-440
96 06 24
00

VA PENS

1133
5-6-76

0000000516

329.00 0060032900

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IDENTIFICATION PROCEDURE

When cashing this check for the individual named above, you should require identification and endorsement in your presence. Claims against endorsement may otherwise result.

Then power should endorse below in ink on the back of the check.

If the endorsement is made by mark (X) it must be witnessed by two persons who can write, giving their places of residence in full.

It is suggested that this check be promptly negotiated.

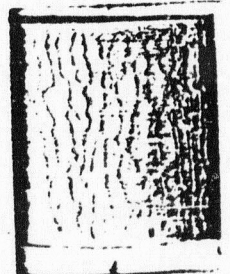
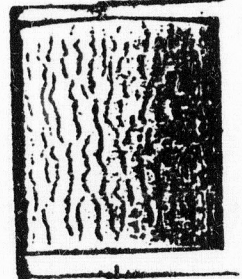
Charles V. Vantage
To R. Perry

76-1-2573

1 FEB 06 1976

50-1-2573

BUY AND HOLD
U.S. SAVINGS BONDS
Safe as America



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UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

TERRENCE R. IRVING

United States Courthouse
Foley Square
New York, New York
January 12, 1977
2:11 P.M.

APPEARANCES:

HENRY KORN, ESQ.
Assistant United States Attorney

Ann Dule
Acting Grand Jury Reporter

NATIONAL REPORTING INC.
CERTIFIED SHORTHAND REPORTERS
FIVE WORLD TRADE CENTER
NEW YORK, N. Y. 10033
[212] 466-1280

MR. KORN: Madam Reporter, could you mark this as
Grand Jury Exhibit 1?

(So marked.)

EMILY J. C O R D E S, called as a witness, having
been duly sworn by the Forelady of the Grand Jury,
testified as follows:

BY MR. KORN:

Q Could you please state and spell your name for the
Grand Jury?

A Emily J. Cordes, C-o-r-d-e-s.

Q Ms. Cordes, I show you what has been marked as Grand
Jury Exhibit 1. Do you know what that is?

A Yes. This is a xerox copy of the testimony of Donald
-- transcript of the testimony Donald B. Howd, -H-o-w-d,
who appeared according to our diary on December 20th, 1976,
a date which appears on the cover sheet, is incorrectly
indicated on the top of the testimony itself.

According to this, Mr. Howd came in twice to the jury room,
and at the conclusion of his testimony, lines four through
nine do not appear. They have -- so it is complete with that
exception, and these minutes were taken by an Acting Grand
Jury Reporter on that date.

MR. KORN: Thank you very much. Can you excuse the
witness, please?

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THE FORELADY: You may be excused.

Q Could you please tell the Grand Jury who you are?

A Yes. I am a Federal Grand Jury Reporter in the Southern District of New York.

MR. KORN: Thank you very much.

Could you temporarily excuse the witness, please?

THE FORELADY: You're excused.

(Witness excused.)

LB/je

UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA :

-v- :

TERRENCE R. IRVING :

----- x

United States Courthouse
Foley Square
New York, New York

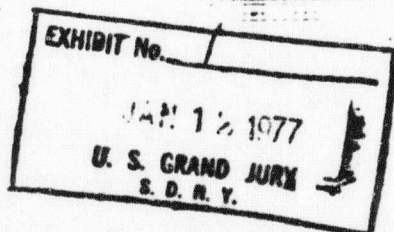
December 20, 1976
2:40 o'clock p.m.

APPEARANCES:

HENRY KORN, Esq.,

Assistant United States Attorney

Linda Bederman
Acting Grand Jury Reporter



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Howd 12-21-76

1
2 DONALD B. HOWD, called as a witness, having
3 first duly sworn by the Forelady of the Grand Jury.
4 filed as follows:

5 BY MR. KORN:

6 Q Could you please state and spell your name for the
7 record?

8 A Donald B. Howd, H-o-w-d.

9 Q Mr. Howd, how are you employed?

10 A As a postal inspector for the U.S. Postal Service.

11 Q How long have you been so employed?

12 A Eleven years.

13 Q Out of what branch or what office are you a postal
14 inspector?

15 A My office is in Mount Vernon, New York.

16 Q Does the Mount Vernon office cover the Poughkeepsie,
17 New York region?

18 A Yes.

19 Q As a postal inspector, Mr. Howd, have you come to
20 know the training procedure for postal employees of the
21 postal service?

22 A Yes.

23 Q Does that include giving postal employees or new
24 potential postal employees information about certain criminal
25 activity?

A Yes.

3 Q And in particular, do you advise them about the
4 consequences of opening mail or touching mail that's addressed
5 to other people than themselves?

A Yes.

Q What do you tell them?

8 A New postal employees are told that to tamper with
9 mail in any way, whether to mishandle it by throwing it away
10 or by actually stealing it or embezzling it is a crime for
11 which they may be prosecuted, and it also may result and
12 probably will result in a dismissal from their jobs.

13 Q Now, in May of 1976 did you receive a complaint
14 from a Mr. Charles Vantassell?

A Yes.

16 Q Do you know what Mr. Vantassell was complaining
17 about?

18 A The complaint was in the form of a claim that he
19 did not receive his Veterans' check for February of 1976.

20 Q Was that check in the approximate amount of
21 \$329?

A Yes.

Q Do you know how mail is delivered to Mr. Vantassell?

A Yes, Mr. Vantassell receives his mail through

25 Post Office Box 64 in the main office, Poughkeepsie, New York.

Howd 12-21-76

15

1

2 Q When you say receives it, his mail is put in a little
3 box?

4 A Yes, in the Post Office building itself. He does
5 not receive delivery in his house.

6 Q Now, in the course of your official duties, have
7 you come to know the type of work that an employee by the
8 name of Terrence R. Irving performs?

9 A Yes.

10 Q What kind of work does she do?

11 A Her work on the Poughkeepsie Post Office is varied.
12 She performs distribution of mail which would include work
13 in and around the box section and window service, selling
14 stamps and other services to the customers.

15 Q So her work would include placing letters in these
16 little mail boxes on occasion; is that right?

17 A From time to time it could, yes.

18 Q Now, I will show you Grand Jury Exhibit 1 marked
19 for identification. Do you know what that is, sir?

20 A Yes.

21 Q Could you tell the Grand Jury what it is?

22 A It's a photocopy of a Treasury check addressed to
23 Mr. Vantassell.

24 Q Could you state to the Grand Jury what names appear
25 on the second page of that exhibit?

1
2 A The second page which represents the reverse side
3 of the check shows two endorsements; Charles Vantassell and
4 T.R. Irving.

5 Q Now, were you informed by Mr. Vantassell that he
6 did not receive this check?

7 A Yes.

8 Q And did he also tell you that he neither endorsed
9 the check, nor authorized anyone to endorse his name on it?

10 A Yes, that's correct.

11 Q Now, in August of 1976, Mr. Howd, were samples of
12 Terrence R. Irving's handwriting taken?

13 A Yes.

14 Q Were the samples and this check sent down to the
15 Crime Lab in Washington for analysis?

16 A Yes, handwriting that was on file at the Post
17 Office and the original check were sent to our laboratory in
18 Washington.

19 Q And did the Crime Laboratory submit a report
20 concerning the results of this analysis?

21 A Yes.

22 Q And what did the handwriting analysis show?

23 A The report from our laboratory in Washington stated
24 that Miss Irving was the author of the signature "T.R. Irving"
25 on the reverse of the check, and that she possibly was the

1
2 Author of the endorsement "Charles Vantassell."

3 Q Now, also in the course of your investigation, was
4 a fingerprint analysis made of this particular check?

5 A Yes.

6 Q And where was that fingerprint analysis made?

7 A At the same laboratory in Washington.

8 Q And what were the results of that fingerprint
9 analysis?

10 A The laboratory informed me that six of Miss
11 Irving's fingerprints were found on the check.

12 Q Now, did Miss Irving at any time ever see the
13 original check which you have just testified about?

14 A Yes.

15 Q In what form did she see it?

16 A When she was interviewed on November 3, she was
17 shown the check in a plastic envelope.

18 Q Now, you say "interviewed on November 3." Was this
19 after her arrest?

20 A At the time of her arrest, yes.

21 Q And isn't it a fact, or is it true, Mr. Howd, that
22 she was interviewed back in June of 1976?

23 A Yes, by Inspector Kennerson.

24 Q Do you know, if you can recall, whether Inspector
25 Kennerson also showed her a copy of a check?

Howd 12-21-76

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A He showed her only a photocopy. That's all that he had in his possession at the time.

Q So he never showed her the original?

A No.

MR. KORN: Now, Ladies and Gentlemen of the Grand Jury, I'd like you to temporarily excuse the witness, if you might.

THE FORELADY: You may be temporarily excused please, thank you.

(Witness temporarily excused.)

MR. KORN: Now, Ladies and Gentlemen, I am going to first instruct you about the hearsay warnings that you hear so often, that is, that Inspector Howd is not testifying altogether from firsthand knowledge.

You are always entitled to hear firsthand testimony in this case, which obviously would include, if necessary, the fingerprint analyst or the handwriting expert, among others.

12-21-76

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A JUROR: He said it's possible that it's
her signature on it. He didn't say that it's her
handwriting.

MR. KORN: Off the record.

(Discussion off the record.)

(Time noted - 3:10 o'clock p.m.)

Howd 12-21-76

1
2 DONALD B. HOWD, recalled as a witness, having
3 been previously duly sworn, resumed and testified
4 further as follows:

5 THE FORELADY: May I advise you that you
6 are still under oath?

7 THE WITNESS: Yes.

8 BY MR. KORN:

9 Q Mr. Howd, a question was raised by the Grand Jury,
10 and I think it would be helpful if you could answer, and
11 the question was to the best of your knowledge did Miss
12 Irving know Mr. Vantassell, the payee of the check, or did
13 Mr. Vantassell know Miss Irving?

14 A As far as we were able to determine from Mr.
15 Vantassell, he does not know Miss Irving.

16 Q And that is not Mr. Vantassell's signature on the
17 reverse side; is that right?

18 A That's correct. Our laboratory also indicated to
19 us that Mr. Vantassell did not sign the name "Charles
20 Vantassell" on the reverse of the check.

21 MR. KORN: Thank you.

22 Would you temporarily excuse the witness?

23 THE FORELADY: You may be excused.

24 (Witness excused.)

25 MR. KORN: I have already prepared the papers

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12-21-76

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1
2 in connection with an indictment, and you may vote
3 on it.

Thank you very much.

10 (Whereupon, Mr. Korn and the Reporter left the
11 Grand Jury room.)

12 (Whereupon, at 3:36 p.m., the Grand Jury voted
13 a true bill.)

1 arrtm

Franck-direct

2 Government. I will permit it. Overruled.

3 Q What is the opinion that you reached, sir?

4 A As a result of my comparisons of the handwriting
5 on Government Exhibits 4, 5 and 6 with the writing of the
6 name T. R. Irving, the second endorsement on the reverse
7 of Exhibit 1, it is my opinion that these two sets of
8 writing were written by one and the same person.

9 Q Mr. Franck, I show you Government Exhibit 6-A
10 which, with a stipulation of counsel, is an offer in evidence,
11 that being a specimen of Charles Van Tassell.

12 Have you ever seen Government Exhibit 6-A before
13 today?

14 A Yes.

15 Q Do you remember when and where you saw it?

16 A I also saw Government Exhibit 6-A in my office
17 on December 8, 1976.

18 Q How do you know that?

19 A Both sheets bear my initials and the date in
20 the lower righthand corner.

21 Q Have you had an opportunity to compare the
22 writing on Government Exhibit 6-A with that on Government
23 Exhibit 1?

24 A Yes.

25 Q Did you reach an opinion as a result of your

T4

1 arrtm

Franck-direct

2 comparison of the signature of Charles Van Tassell on
3 Exhibit 6-A and the payee's signature on Government Exhibit
4 1?

5 A Yes.

6 Q What was your opinion?

7 A As a result of comparing the two purported
8 genuine Charles Van Tassell signatures enclosed within
9 the boundaries of a circular line on both sheets of Ex-
10 hibit 6-A, writing the same name as the payee on the re-
11 verse of Exhibit 1, it is my opinion that that payee en-
12 dorsement is not a signature and written by someone other
13 than the true Charles Van Tassell on Exhibit 6-A.

14 Q Did you reach an opinion as to whether the
15 author of the second endorsement, T. R. Irving, wrote the
16 first endorsement, Charles Van Tassell, on Government Ex-
17 hibit 1?

18 A Yes.

19 Q What is your opinion there, sir?

20 A As a result of my comparison of Exhibits 4, 5
21 and 6 with the writing of this first name, the payee en-
22 dorsement on the reverse of Exhibit 1, I cannot eliminate
23 the writer of Exhibits 4, 5 and 6 as the author of that
24 endorsement.

25 I would phrase my opinion in this way, that it

1 arrtm Franck-direct

2 is possible that these two sets of writing were written
3 by the same person.

4 MISS BARLOW: I object to that statement, some-
5 thing is possible. Anything is possible. There is no
6 foundation for that.

7 THE COURT: Overruled.

8 Q Could you elaborate when you refer to the fact
9 that the defendant Terrence Irving possibly wrote Charles
10 Van Tassell, what, in your opinion, in your experience,
11 tell us what possible means?

12 A In the way of explanation, handwriting is com-
13 pared and Identified or eliminated pretty much the same as
14 anything else is, people or things.

15 To be able to identify two sets of writings,
16 you have to have a combination of common characteristics
17 and individual characteristics and no basic differences
18 between the two sets of writings.

19 In this instance, comparing the first endorse-
20 ment on the reverse of Exhibit 1 with the specimen writings,
21 Exhibits 4, 5 and 6, I did find some similarities, both
22 common and individualistic. However, I also found some
23 differences between the two sets of writings.

24 Q What are some of the commonalities that you
25 found in Government Exhibits 4, 5 and 6 and Government

USA v. Irving 2
76 Cr. 1132
2/23/77

1 arrtm 1

(Stewart, J.)

CHARGE OF THE COURT

23
4 THE COURT: Now, ladies and gentlemen, we
5 have come to that part of the case where the evidence is
6 all in, the lawyers have presented their arguments and
7 you are about to exercise your final role, to pass upon
8 and decide the factual issues in this case.

9 It is your responsibility to reach a just
10 verdict in determining the charges against this defendant.
11 I know that you will deliberate toward reaching a verdict
12 fairly, honestly and conscientiously.

13 I want to emphasize that you are the sole,
14 exclusive judges of the facts. You pass upon the weight
15 of the evidence, you resolve such conflicts as there may
16 be in the evidence and you draw such reasonable inferences
17 as may be warranted by the testimony or the exhibits. My
18 function now is to instruct you on the law applicable to
19 this case.

20 It is your sworn duty to accept the law as I
21 say it to you in these instructions. It is not what the
22 lawyers may have said the law is, and you are to apply it
23 to the facts as you find them.

24 As I have said, with respect to any fact matter,
25 it is your recollection, yours alone that governs. Anything

1 arrtm 2

2 that counsel either for the Government or for the defendant
3 may have said with respect to matters in evidence is not
4 to be substituted for your own recollection of the evidence.
5 Also, anything that I may have said during the trial or
6 in these closing remarks, my instructions, is not to be
7 taken in place of your own recollection of the evidence.

8 You may not take into account in deciding this
9 case or consider in any way any extraneous matters such as
10 anything outside this courtroom or in the jury room or in
11 the courthouse, or any other place. Only the evidence
12 presented to you in this courtroom may be considered.

13 The fact that the Government is a party, that
14 the prosecution is brought in the name of the United
15 States, entitles it to no greater consideration than that
16 accorded to any other party, to the defendant in this
17 litigation. By the same token, it is entitled to no less
18 consideration.

19 Some general principles of law, most of which
20 I have already stated to you, but I want to repeat. The
21 indictment is simply an accusation, a charge, it is not
22 evidence of anything.

23 You may give no weight to the fact that an
24 indictment has been returned against this defendant. The
25 defendant has pleaded not guilty and therefore the Govern-

1 arrrtm 3

2 ment has the burden of establishing and proving to your
3 satisfaction, beyond a reasonable doubt by competent
4 evidence, the charges made against her. Whether this
5 burden is sustained does not depend upon the number of
6 witnesses or the quantity of testimony but rather on the
7 nature and quality of the testimony, and are the evidence.

8 This burden never shifts. It remains upon the
9 Government throughout the trial and it is upon the Govern-
10 ment now and the defendant does not have to prove her
11 innocence. On the contrary, she is presumed to be innocent
12 of the accusations contained in the indictment and the
13 Government must prove to your satisfaction her guilt be-
14 yond a reasonable doubt.

15 This presumption of innocence was in the de-
16 fendant's favor when the trial began, it continued in her
17 favor during the trial and it is in her favor now and re-
18 mains in her favor when you retire to deliberate. It is
19 removed only if an when you are satisfied that the Govern-
20 ment has sustained its burden of proving beyond a reason-
21 able doubt the guilt of the defendant.

22 It is for this reason that the defendant does
23 not need to take the witness stand. Although in fact as
24 you know the defendant here has testified on her own be-
25 half.

1 arrtm 4

2 I have mentioned several times reasonable
3 doubt. Reasonable doubt is such a doubt as would cause
4 you to hesitate to act in a manner of importance in your
5 own lives. It is a doubt which a reasonable person has
6 after carefully weighing all the evidence. It is one
7 which appeals to your reason, your judgment, your own ex-
8 perience. It is not caprice, speculation, whim. It is
9 not an excuse to avoid the performance of an unpleasant
10 duty. Speculative or imaginary qualms or misgivings are
11 not reasonable doubts.

12 It is not necessary for the Government to prove
13 the guilt of a defendant to a mathematical certainty, be-
14 yond all possible doubt. In our world it is practically
15 impossible for a person to be absolutely and completely
16 convinced of any contraverted fact which, by its very
17 nature, is not susceptible of mathematical certainty.

18 In consequence, the law is that in a criminal
19 case like this, it is enough to prove that the defendant
20 is guilty if it is established beyond a reasonable doubt
21 but not beyond all possible doubt.

22 If after a careful and impartial consideration
23 of all of the evidence in the case or the lack of evidence
24 you can honestly say that you have such a doubt as would
25 cause a prudent person to hesitate before acting in matters

1 arrtm 5

2 of importance to himself, then you have a reasonable doubt
3 and, in that circumstance, it is your duty to acquit, to
4 find the defendant not guilty.

5 On the other hand, if after a fair and im-
6 partial consideration of all the evidence you can honestly
7 say that you have such an abiding conviction of the guilt
8 of the defendant that you would be willing to act upon
9 this conviction in important matters and weighty matters
10 in your personal affairs, then you have no reasonable
11 doubt and, in that circumstance, it is your duty to find
12 the defendant guilty.

13 A reasonable doubt may arise not only from the
14 evidence presented but also from the lack of evidence,
15 since the burden, as I have told you, is always on the
16 Government to prove the defendant guilty of every essential
17 element of the crime charge beyond a reasonable doubt.

18 I am going to read now the indictment. I under-
19 stand that you will be handed a copy of the indictment when
20 you retire to deliberate in the jury room.

21 (Indictment read.)

22 Each of these two counts which I have just read
23 to you charges a separate count and must be considered
24 separately by you. The statute involved in Count 1 reads
25 as follows:

1 arrtm 6

2 "Whoever being a postal service employee em-
3 bezzles any letter or any article or thing contained
4 therein which comes into his possession intended to be
5 conveyed by mail or steals, abstracts or removes from any
6 such letter or mail any article or thing contained therein,"
7 shall be guilty of a crime.

8 To find the defendant guilty of the crime
9 charged in Count 1 of the indictment, you must be convinced
10 that the Government has proven each of the following ele-
11 ments beyond a reasonable doubt:

12 First, that on or about February 1, 1976 the
13 defendant was a postal service employee.

14 Two, that on or about February 1, 1976, the
15 date of the check in the indictment, the check came into
16 the defendant's possession.

17 Third, that the check was intended to be con-
18 veyed by mail.

19 Fourth, that the defendant unlawfully, willfully
20 and knowingly embezzled or stole the check on or about the
21 date charged.

22 As to the word embezzle, a person is said to
23 embezzle property of another if he is entrusted with it
24 or comes into possession of it by virtue of his office or
25 position of trust and wrongfully takes it or willfully

1 arrtm 7

2 misappropriates it.

3 As to the elements unlawfully, willfully and
4 knowingly, you must be satisfied beyond a reasonable doubt
5 that the defendant knew what she was doing and that she
6 did it deliberately and voluntarily, and not because of
7 mistake, accident, negligence or some other innocent reason.

8 An act is willful if it is done knowingly and
9 deliberately, with an evil motive or purpose. Unlawful
10 means contrary to the law.

11 In determining whether the defendant has acted
12 knowingly and willfully, it is not necessary that the de-
13 fendant knew she was violating any particular law. It is
14 sufficient if you are convinced beyond a reasonable doubt
15 that the defendant was aware of the general unlawful nature
16 of her acts as alleged in the indictment.

17 Knowledge and intent exist in the mind. It
18 is not possible to look into a person's mind to see what
19 went on, so the only way you have for arriving at a de-
20 cision on this question is for you to take into considera-
21 tion all the facts and circumstances shown by the evidence,
22 including the exhibits, the testimony, to determine from
23 all such facts and circumstances whether the requisite
24 knowledge and intent were present at the time in question.

25 Direct proof is not necessary. Knowledge and

1 arrtm 8

2 intent may be inferred from all the surrounding circum-
3 stances.

4 In Count 2 the defendant is charged with vio-
5 lating the following statute:

6 "Whoever falsely makes, alters, forges or
7 counterfeits any writing for the purpose of obtaining or
8 receiving from the United States or any officer or agency
9 thereof any sum of money, or whoever utters or publishes
10 as true any such false, forged or counterfeited writing
11 with intent to defraud the United States knowing the same
12 to be false, altered, forged and counterfeited," commits
13 a crime.

14 The phrase "utters or publishes as true" as
15 used in this statute means to make or attempt any use of
16 a written instrument or document, such as an attempt to
17 place a check in circulation in connection with which some
18 assertion, representation or claim is made to another in
19 some way or manner, directly or indirectly, expressly or
20 impliedly or by words or conduct, that the check or docu-
21 ment is genuine.

22 In order to convict the defendant on the charge
23 of uttering or publishing a forged check, you must find
24 each of the following elements beyond a reasonable doubt:

25 First, that the endorsement of Charles

1 arrtm 9

2 Van Tassell on the back of the check is a forgery, whether
3 the defendant or someone else wrote it.

4 Two, that on or about February 6, 1976, the
5 defendant offered the check to someone else, knowing this
6 endorsement was a forgery.

7 Three, that the defendant intended to defraud
8 the United States.

9 To explain the word forgery, a person signing
10 a check in the name of another commits forgery unless he
11 has authority from the other person to do so or bona fide
12 believes that he has such authority.

13 The phrase "intends to defraud," the third
14 element as I have indicated of the offense of uttering,
15 is an attempt to defraud the United States. To establish
16 this element it is not necessary to prove that the Govern-
17 ment would thereby suffer a pecuniary loss. It is enough
18 if the unlawful activity be engaged in for the purpose of
19 frustrating the administration of the statute or that it
20 tends to impair a Government function such as the payment
21 of a veterans disability payment.

22 Count 2 also includes the allegation that the
23 defendant acted willfully, unlawfully and knowingly, which
24 I have just explained to you in connection with Count 1.

25 The counts of the indictment as you have noted

1 arrrtm 10

2 charge that certain acts occurred on or about certain
3 dates. It does not matter that the transaction occurred
4 on the exact date listed in the indictment. The law only
5 requires substantial similarity between the dates alleged
6 in the indictment and the dates established by the evidence.

7 There are two types of evidence upon which you
8 may properly rely in deciding guilt or innocence. I want
9 to make sure you understand these two types of evidence.

10 Direct evidence is where a witness testified
11 to what he or she saw, heard or observed or knows of his
12 or her own knowledge, something which comes to him or her
13 by virtue of his or her senses.

14 Circumstantial evidence is evidence of facts
15 or circumstances from which one may infer connected facts
16 which reasonably follow in the common experience of man-
17 kind.

18 Circumstantial evidence is that evidence which
19 tends to prove disputed facts by proof of other facts.

20 There is a simple example which we use often
21 in this courthouse in explaining what we mean by circum-
22 stantial evidence.

23 Assume when you entered Court this morning the
24 sun was shining, it was a nice day. Assume also that in
25 the courtroom the blinds were shut, you couldn't look out

1 arrtm 11

2 the windows and as you are sitting here someone walks in
3 with an umbrella dripping wet.

4 Somebody else walks in with his raincoat soak-
5 ing wet. You cannot look out the courtroom and cannot see
6 whether or not it is in fact raining, but on the combina-
7 tion of the facts which I have just asked you to assume,
8 it would be reasonable and logical for you to conclude that
9 it had been raining. That is all there is to circumstantial
10 evidence, you infer based on reason and experience from
11 established facts the existence of some other fact.

12 Circumstantial evidence is of no less value
13 than direct evidence. In general the law makes no dis-
14 tinction between direct and circumstantial evidence but
15 simply requires that before you can convict a defendant,
16 the jury must be satisfied of the defendant's guilt beyond
17 a reasonable doubt from all the evidence in the case.

18 There are times when different inferences may
19 be drawn from certain sets of facts. An inference is a
20 deduction, a conclusion, which the jury is permitted to
21 draw from facts which have been established by either
22 direct or circumstantial evidence.

23 An inference is not drawn by speculation or
24 guesswork but rather must be arrived at by the exercise of
25 your reason, your common sense. So while you are consider-

1 arrtm 12

2 ing the evidence presented, you are permitted to draw from
3 the facts which you have found to be proven, such reasonable
4 inferences that seem justified in the light of your ex-
5 perience.

6 As jurors you are the sole judges of the
7 credibility and truthfulness of each witness. In weighing
8 the testimony of each witness, you should consider the
9 relationship to the Government, the extent of the witness'
10 interest in the outcome of the case, his manner of tes-
11 tifying, his appearance and conduct while on the witness
12 stand, his intelligence, the strength or weakness of his
13 recollection and the extent to which he has been corroborated
14 or contradicted, if at all, by other credible witnesses.

15 Because a particular witness may be a law en-
16 forcement officer does not mean that his testimony deserves
17 any special consideration or any great weight by reason of
18 that fact. By the same token, it is entitled to no lesser
19 consideration.

20 As I have told you, the law imposes no duty
21 upon a defendant to testify on his own behalf or even to
22 produce any evidence. Miss Irving chose to take the stand.
23 Obviously the defendant has a deep personal interest in
24 the result of this trial and, indeed, it is fair to say
25 she has the greatest interest in the outcome. Interest

1 arrtm 13

2 may create a motive for false testimony. In appraising
3 her credibility you may take that fact into consideration.

4 However, I want to say this to you with equal
5 force, it by no means follows that simply because a person
6 has a vital interest in the end result that he or she is
7 not capable of telling a truthful and straightforward
8 story. It is for you to decide to what extent, if at all,
9 the defendant's interest has affected her testimony.

10 There has been testimony of a handwriting
11 expert concerning his opinion as to the endorsement on the
12 back of the check involved in the indictment, as well as
13 other specimens of handwriting. There also was the tes-
14 timony of the fingerprint expert concerning his opinion
15 as to the fingerprints on the check involved in this case.

16 The rule is that witnesses are permitted to
17 testify only as to facts and may not express their opinions.
18 The exception to this rule is the opinion of a qualified
19 expert on some technical matter. The expert may testify
20 as to his opinion on a subject concerning which he has
21 special knowledge. This is allowed on the theory that the
22 advice of one experienced and versed in a technical or
23 special subject will aid the jury.

24 You may consider the expert's qualifications
25 and opinion, weigh his reasons, if any, and give his such

1 arrtm 14

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2 testimony such weight as you think and feel it deserves.

3 As previously stated, an expert's opinion is
4 purely advisory. You may reject it entirely if, in your
5 judgment, the reasons given for it are not convincing or
6 sound. The determination rests with you, not with the
7 experts.

8 The chart of evidence that is before you are
9 not evidence in themselves. These are merely visual repre-
10 sentations for data that is set forth in the testimony
11 of the witnesses and in documents that have been received
12 in evidence. They are not better than the testimony or
13 document upon which they are based. It is for you to de-
14 cide whether the charts correctly present the data set
15 forth in the testimony and in the exhibits on which they
16 are based.

17 The defendant has called witnesses who have
18 testified to her character and good reputation in the
19 community. You should consider their evidence together
20 with every other fact and the evidence in the case in
21 determining the guilt or innocence of the defendant.

22 Such evidence may indicate to you that it is
23 improbable that a person of good reputation would commit
24 the offense charged. So evidence of good reputation may
25 in itself create a reasonable doubt where without such

1 arrtm 15

2 evidence no reasonable doubt would have existed.

3 Accordingly, if after considering the question
4 of the defendant's good reputation you find a reasonable
5 doubt has been created, you may acquit her of the charges.
6 But, if from all the evidence you are satisfied beyond
7 reasonable doubt that the defendant is guilty, a showing
8 she previously enjoyed a good reputation and good character
9 does not justify or excuse the offense and you should not
10 acquit her merely because you believe she is a person of
11 good reputation or a person of good repute.

12 If you find that any witness has deliberately
13 testified falsely as to any material fact, you may dis-
14 regard all of the testimony or accept that part of the
15 testimony which you believe is truthful and which you find
16 to be corroborated or supported by other evidence in the
17 case.

18 A few final instructions. During the trial
19 from time to time there has been objection made by one or
20 the other of the parties. It is the duty of a lawyer, as
21 I am sure you recognize, to object when he or she believes
22 that an objection should be made. You should not be
23 prejudiced in any way against anyone because of an objection
24 made or because of my ruling on an objection.

25 Under your oath as jurors, as I told you at the

1 arrtm 16

2 outset, you cannot allow consideration of possible punish-
3 ment which may be inflicted upon a defendant if convicted
4 to influence your verdict in any way or enter into your .
5 deliberations. The duty of imposing sentence rests ex-
6 clusively with me. Your function is to weigh the evidence
7 and determine guilt or innocence solely on the basis of
8 the evidence and the law as I have given it to you.

9 You must not be influenced by any assumption,
10 conjecture or sympathy or any inference not warranted by
11 the evidence. The purpose of your deliberations is to
12 exchange views with your fellow jurors, discuss and con-
13 sider the evidence, listen to each other's arguments,
14 present your own views and reach a unanimous verdict as
15 to each count based solely on the evidence, if you can do
16 so without violence to your own individual judgment.

17 Each of you must decide the case for yourself
18 but do so only after an impartial consideration of the
19 evidence in the case and after discussion with your fellow
20 jurors. Do not hesitate to reexamine your views and change
21 your opinion when, after a discussion, it appears that you
22 are in error.

23 But if after carefully considering all of the
24 evidence in the case, after considering the arguments of
25 your fellow jurors, you still have a conscientious view

1 arrtm 17

2 which differs from the rest of the jury, you are not to
3 yield your views simply because you are outnumbered.

4 If in the course of your deliberations you wish
5 to examine any of the exhibits or you wish to have any of
6 the testimony read back to you or anything else which you
7 need from me, please hand a note to the marshal and we will
8 do everything to help you. In communications to me, do not
9 in any way indicate what your vote at the moment might be.

10 You must return a verdict on each count separately
11 as to this defendant and your verdict as to each count must
12 be unanimous.

13 Counsel?

14 (The following took place in the Robing Room.)

15 MISS BARLOW: No exceptions, Judge, but I do
16 have two additional requests.

17 One, that your Honor indicate that the question
18 which is posed by counsel is not evidence, only the answer
19 to the question, and the other thing is that the charge
20 left them with the impression, it seems to indicate that
21 they have to come back with a verdict. I think that you
22 should clarify that if they can't in good conscience come
23 back with a verdict, they are not obligated to.

24 MR. KORN: We object to that, your Honor.

25 THE COURT: I don't think I need to say that.

1 arrtm 18

2 I think they should understand that. I think I would not
3 say that now. If they indicate they are in trouble later
4 on --

5 MISS BARLOW: Frankly, later on may be a problem
6 because as it stands now, this is the last thing that the
7 jury is left with, indicating that they must come back with
8 a verdict on Count 1 and 2.

9 THE COURT: It must be unanimous.

10 MISS BARLOW: But the phraseology was that you
11 must return a verdict as to each count separately and in-
12 dependently, and that leads one to believe that they must
13 come back with a verdict on the two counts, which is not
14 the case.

15 MR. KORN: We object to it because it encourages
16 a hung jury and there is no reason for that. Your Honor is
17 correct on it.

18 THE COURT: I don't think I need change it,
19 Miss Barlow. I will say something like "Remember that you
20 must have a verdict as to each count separately and that
21 whatever verdict you reach on each count must be unanimous."
22 That is as far as I will go.

23 MISS BARLOW: Respectfully accept.

24 MR. KORN: Nothing, your Honor.

25 (In open court.)

1 arrtm 19

2 THE COURT: I want to make clear, ladies and
3 gentlemen, that when I referred to remarks of counsel,
4 remarks by me not being evidence, questions which counsel
5 may have put to the witness are not evidence. But what
6 counsel puts into a question isn't evidence, it is what
7 the witness says that is evidence.

8 As you will see when you look at the indictment,
9 there are two counts. You must deal with each count
10 separately and whatever verdict you return on either count,
11 each count, as I have told you, your verdict must be
12 unanimous.

13 (Alternate jurors excused by the Court.)

14 THE COURT: Swear the marshal.

15 (The marshal sworn by the Clerk.)

16 THE COURT: Let counsel look at a copy of the
17 indictment and, Mr. Foreman, you may retire to begin your
18 deliberations.

19 (Jury left the courtroom at 4:55 p.m.)

20 MR. KORN: The Government has reviewed the
21 copy of the indictment and find it is all right.

22 MISS BARLOW: The defendant has now reviewed
23 the copy and finds that it is an accurate copy and I have
24 no objection.

25 (Note received from the jury at 5 p.m.)

T14

1 arrtm 20

2 THE COURT: I have a note which reads, "Checks,
3 signatures, fingerprints."

4 I take it what they want is the checks obviously
5 and all the signature information and all the fingerprint
6 papers.

7 Could you and Mr. Korn assemble them right now,
8 and when you have agreed upon it, give them to the marshal.
9 Would you do that in the back of the courtroom?

10 MR. KORN: Sure.

11 (Jury returned to the courtroom at 5:40 p.m.)

12 THE COURT: The second request reads, "Define
13 embezzlement." I will read what I read before.

14 Ladies and gentlemen, I have your second re-
15 quest which reads, "Define embezzlement."

16 I will tell you what I said before in my charge.

17 A person is said to embezzle the property of
18 another if he or she is entrusted or comes into the posses-
19 sion of it by virtue of his office or position of trust
20 and wrongfully takes it or willfully misappropriates it.

21 All right, ladies and gentlemen, we are going
22 to adjourn at this time. You will reassemble tomorrow
23 morning at 9 o'clock. You may begin your deliberations
as soon as all 12 of you are here. You are not to de-
liberate until all 12 of you are present. So therefore

1 arrtm 21

2 it is important that you all be prompt, as I know you will
3 be.

4 One other thing. My usual admonition applies,
5 that you may not discuss this case among yourselves except
6 when all 12 of you are present in the jury room, and you
7 may not discuss it among yourselves outside of the jury
8 room or with anybody else. I want to emphasize the "or
9 with anybody else."

10 I know perhaps you will be asked questions by
11 members of your family or friends, but do not discuss the
12 case with anybody. I am sure you will all understand why
13 that must be so.

14 All right, ladies and gentlemen, 9 o'clock
15 tomorrow morning and have a good evening.

16 (Jury notes marked as Court Exhibits 1 and 2.)

17 (Adjournment taken until February 24, 1977 at

18 9 a.m.)

19 - - -
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25

xxx

United States of America vs.

United States District Court for

Southern District of New York

A102

DEFENDANT

TERRENCE R. IRVING

DOCKET NO.

(S)(S) 76 Cr. 1132

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6, 7-7)

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
April 7, 1977

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Joyce Barlow, Esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY.

2 ct. indictment:

FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of
Employee (Title 18, USC, Section 1709; Ct.1- Embezzlement of Mail by a Postal
(Title 18, USC, Section 495)

SENTENCE
OR
PROBATION
ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

Imposition of sentence is suspended and the defendant is placed on Probation for a period of TWO (2) YEARS, subject to the standing Probation Order of this Court/.
Sentence imposed on each of counts 1 and 2 and are to run concurrently with each other.

Defendant was advised of her Rights pursuant to Rule 32(a)(2) of the Federal Rules of Criminal Procedure

The Court granted defendant leave to proceed on appeal in forma Pauperis .

SPECIAL
CONDITIONS
OF
PROBATION

A Special Condition of Probation being that defendant make restitution, in a manner as directed by the Probation Department of this Court

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

BEST COPY AVAILABLE

SIGNED BY

U.S. District Judge

U.S. DISTRICT COURT
FILED

UNITED STATES DISTRICT COURT
For the Southern District of New York

UNITED STATES OF AMERICA

Docket Number S 76 Cr. 1132 (C.E.S.)

-v-

TERRENCE R. IRVING,

Defendant.

Charles E. Stewart

(District Court Judge)

NOTICE OF APPEAL

Notice is hereby given that Terrence R. Irving appeals to
the United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ order ☐ other
(specify) _____ entered in this action on April 7, 1977
(Date)

Joyce Krutick Barlow

(Counsel for Appellant)

Address

Date April 11, 1977

To:

Robert B. Fiske, Jr.
U.S. Attorney for the
Southern District of New York
Attorney for the U.S.A.

233 Broadway
New York, N. Y. 10013

Phone Number 233-1571

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B

QUESTIONNAIRE

TRANSCRIPT ORDER

DESCRIPTION OF PROCEEDINGS
FOR WHICH TRANSCRIPT IS
REQUIRED (INCLUDE DATE).

☒ I am ordering a transcript

☐ I am not ordering a transcript

Reason:

☐ Daily copy is available

☐ U.S. Attorney has placed order

☐ Other. Attach explanation

Prepare transcript of

☐ Pre-trial proceedings

☒ Trial 2/22/77, 2/23/77 2/24/77

☒ Sentence 4/7/77

☐ Post-trial proceedings

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ☒ Method of payment ☐ Funds ☒ CJA Form 21

ATTORNEY'S signature [Signature]

DATE April 11, 1977

COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and
forwarded to Court of Appeals.

Date order received

Estimated completion date

Estimated number
of pages.

Date _____

Signature _____

(Court Reporter)

COPY FOR DEFENDANT

COPY RECEIVED
JUN 17 1977
ROBERT E. FISKE JR.
U.S. ATTORNEY
SO. DIST. OF N.Y.